



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Appeal 480 of 2009

DYNCORP INTERNATIONAL LLC. APPELLANT

VERSUS

TRAX CONSTRUCTION LTD. RESPONDENT

R U L I N G

This appeal was regularly filed in the Civil Division of this court on 31st March, 2009 by a Memorandum of Appeal of the same date. The appeal originated from a Local Arbitration Tribunal. The appeal was admitted by a single Judge on 31st January, 2012.

On 28th November, 2011 the appeal directions were taken in the presence of both disputing parties or their counsel, again before a single judge. Both counsel recorded their wish to later proceed to argue the appeal through written submissions which order was then reduced to become one of the court's directions.

As things happened, however, parties agreed to and filed and served their written submissions to dispose of the appeal, again before a single judge. It was fixed for a mention for the parties to take a date for judgment on 5th March, 2012.

On 5th March, 2012, Mr. Opiyo for the Appellant, for the first time raised the possibility that the appeal should be transferred to the Commercial Division for the hearing to be undertaken by a two judge Bench. He admitted that he should but did not raise the issue during the taking of directions which had already gone by. When the issue became a dispute, both counsel agreed to adjourn to 16th March, 2012 to seek a settlement. Later, on 26th March, 2012, both counsel requested for an order to refer the matter to the Hon. The Chief Justice to resolve the issue as to the kind of Bench which should determine the appeal.

When the file reached the Hon. The Chief Justice, he commented thus: -

“May 07, 2012,

I do not know under what provisions of the law I am being asked to determine whether this matter should be heard by one or two Judge's. Since the parties do not agree on the issue I direct that they argue the matter before Judge Onyancha and the Learned Judge makes a considered ruling on the issue.”

Consequently, the parties argued the issue by written submissions and highlighting thereof on 13th June, 2012 and 6th July, 2012. The result is this ruling.

I have carefully perused the argument from both parties. The Appellant who wants the appeal to be argued before a two-judge bench, referred to Section 79C. It provides thus: -

“Appeals from subordinate courts shall be heard by one judge of the High court except when in any particular case the Chief Justice shall direct that the appeal be heard by two or more judges of the High Court; and such direction may be given before the hearing of the appeal or at any time before Judgment is delivered.”

In my view, the above provision is quite expressly clear. In this case the Appellant argued that the appeal should be heard by a bench of two judges because: -

- a) *The judgment to result out of the appeal will be of public importance because it will arise from an Alternative Dispute Resolution suit in the construction industry.*
- b) *The appeal raises commercial and contract interpretation issues of public importance.*
- c) *The amount of money sought and probably payable is large US\$1,408,510/-).*
- d) *Similar appeals were earlier being handled in Commercial Division.*
- e) *This issue was not raised during directions given under Order 42 of Civil Procedure Rules.*
- f) *The Respondent will suffer no prejudice if the appeal is heard by a two Judge bench.*

In response the Respondent argued that: -

- a) *The Appellant raised the issue of a two judge bench on second thought and too late and after the appeal had been fully argued through written submissions.*
- b) *That the Appellant, having failed to raise the issue during the taking of directions, cannot raise it thereafter.*
- c) *The Appellant’s intention is to delay the completion of the appeal through legal technicalities to his (its) advantage and to the prejudice of the Respondent who holds a judgment in its favour.*
- d) *The appeal issues are simple issues of legal interpretation of a contract and there are no other complex issues that a single judge cannot handle.*
- e) *The Appellant should not be allowed to select the bench to hear his appeal.*
- f) *All applications filed and heard inclusive of the directions were heard and decided by a single judge.*

I have carefully considered all the points for argument raised by both parties above. In my view, concerning Section 79C, appeals, are in common practice to be heard and are indeed heard by a single judge. However, in comparatively very few cases, the Chief Justice may direct that they be heard by two or more judges. My understanding of this is that the Chief Justice has power, either suo moto or on application by a party or parties, to direct in which appeal there should be a bench of two or more judges of the High Court to hear the appeal(s). A choice or decision of such appeal or appeals shall be based on the uniqueness and circumstances of the appeal(s).

In this case, I find no good reasons upon which I would make a preliminary recommendation for a two-judge bench. First, the appeal is in my view, already fully argued before a single judge, through written submissions, a method both parties sought and obtained. The position remains the same whether or not

the court can reverse the gear and allow the highlighting of the written arguments which was not sought by either party. Secondly, the Appellant does not argue that a single judge has no jurisdiction, otherwise it could have raised same during the taking of directions. Nor does the Appellant argue that it would be quicker, easier or more convenient for the appeal to be completed by a single Judge, who in any case, is the one ordinarily, entitled to hear the appeal under Section 79C of the Civil Procedure Act.

Indeed, if anything, a hearing before a single judge which is already done, would be easier, quicker and to that end, in the interest of justice.

Thirdly, the appellant ought to, but did not, raise the issue of the bench to handle the appeal, during the taking of directions. It should not be allowed to do so late in the day. It is also noted that the raising and clearing of jurisdiction issue during the directions is mandatory as the word used to qualify “**raised**” is “**shall**”, not “**may**”.

Fourthly, in my view, all appeals, whether appealed from commercial, tenancy, civil, contractual, labour, environmental or others, appealed from subordinate Tribunals, including ordinary courts, are filed and handled in the Appeals Section of the Civil Division. It would certainly, be not so logical to argue that such matters, can properly and regularly be handled by honourable magistrates or chairmen or tribunals of a single or more officers, but cannot similarly be effectively handled by a single judge of the High court who otherwise ordinarily, hears all appeals filed in the Civil Division.

Fifth, I see no complex issue in interpreting contractual or commercial contracts. Every magistrate or High Court Judge does that every day in his core function as a judicial officer.

Finally, it prejudices the judgment creditor to delay the realization of his decree in any way, including through any kind of delay.

In the above circumstances, I find no good reasons or sufficient justification in the application by the Appellant to seek that this appeal be heard by a bench of two Judges. Subject to any directions under Section 79C of the Civil Procedure Act, if any, I direct that the parties take a date for judgment based on the already written, filed and served written submissions. Orders accordingly.

Dated and delivered at Nairobi this 25th day of September, 2012.

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D A ONYANCHA
JUDGE